ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

January 31, 2003

Ms. Marlene H. Dortch
Federal Communications Commission
445 12th Street, S.W., Room 1-A836
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation in CC Docket No. 01-338

Dear Ms. Dortch:

Pursuant to Sections 1.1206(b)(2) of the Commission's Rules, this letter is to provide notice in the above-captioned docketed proceedings of ex parte meetings on January 30 and 31, 2003, by Jonathan Askin of the Association for Local Telecommunications Services (ALTS), Julia Strow of Cbeyond Communications, Ed Cadieux of NuVox, Royce Holland and Kevin Joseph of Allegiance Telecom, Praveen Goyal of Covad Communications, John Heitmann of Kelley Drye, Thomas Jones of Willkie Farr, and Patrick Donovan of Swidler Berlin. The Parties met separately with Lisa Zaina, Dan Gonzalez, and Matt Brill.

The Parties stressed the need for the FCC to ensure that ILECs provide unbundled access to loops, transport and enhanced extended links. The parties discussed the inevitable setbacks to telecom competition if the FCC were to deny CLECs unbundled access to these bottleneck facilities. The parties stressed that the facts show that access to unbundled loops, transport and EELs is still critical to CLECs' ability to compete. The parties indicated that, whatever new rules or rule modifications the FCC adopts, the FCC must not allow the ILECs to latch onto new loopholes to effectively preclude CLEC access to UNEs and UNE combinations. The parties further emphasized the need for clear presumptions favoring UNE provisioning and procedures to ensure swift enforcement of the FCC UNE provisioning rules.

With regard to unbundled transport, the Parties contended that the impairment analysis must be applied on a route-by-route basis. Proxy tests that consider broadly how much alternative transport is available over a broader geographic area or how many carriers are collocated in ILEC end offices cannot demonstrate whether the requesting carrier is impaired without unbundled access to ILEC transport on a particular route. The Parties expressed concerns over the possibility of the FCC adopting a transport impairment test that relies on a "contestable market" proxy for the availability of true route-specific competitive alternatives to ILEC transport facilities. Such a proxy demonstrates nothing about the availability of transport alternatives throughout that geographic area generally, or on the required route in particular. Satisfaction of an impairment test calling for the mere existence of self-provisioners in a broader geographic area that does not consider the particular route would leave the ILEC with monopoly control over every route where insufficient alternatives exist.

The Parties also urged that the FCC decline to adopt a capacity-based cap on the availability of UNE transport facilities. Determining the capacity level at which competitors can economically self-deploy transport is an intensely fact-specific and situation-specific inquiry, that can vary dramatically based on changing market-conditions, such as vacillating capital and equipment markets, geographic conditions, service mix, and customer base. Any fixed threshold adopted by the FCC would be arbitrary and could not be sufficiently narrow and responsive to these situation-specific and dynamic factors. Precluding more than "x" number of DS-3 on a route to be purchased as UNEs is, without doubt, an arbitrary proxy to demonstrate when a CLEC has a sufficient customer or revenue base such that it would not be impaired without access to ILEC unbundled

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transport. The record cannot justify why "x" (not "y") is the correct number in every market and over time when technology and Moore's law will dramatically alter the revenue obtainable over the same capacity. Capacity and revenue obtained from a given capacity is dramatically changing over time -- the same DS-3 will deliver much more capacity over time, while the potential revenue obtained from that capacity will undoubtedly decline precipitously.

The Parties also discussed inevitable problems caused by imposition of use restrictions or eligibility criteria on new UNE combinations and stand-alone UNE loops. Every problem CLECs have experienced with special access to EEL provisioning would be realized with UNE loops, an area of provisioning that the CLECs had thought was almost resolved after six years of ILEC gamesmanship and periodic regulatory fixes to fill the loopholes that had allowed such gamesmanship. The Parties noted the logistical nightmare of having to police, monitor, measure and audit end user traffic. Most CLECs do not and, due to their technology, often cannot measure breakdown between LEC services and interexchange services. Thus, monitoring and policing is impractical, if not impossible. Furthermore, such an approach allows too much room for ILEC gaming and prejudging of circuit eligibility and would add such a layer of uncertain that it would effectively preclude any CLEC from even attempting to order new combinations or DS-1 UNE loops. Such action would put such a cloud of uncertainty over the whole CLEC business that this action alone would, at a minimum drive CLECs up market and small business customers would be left with whatever monopoly priced services the ILEC decides to offer and no affordable competitive service offerings. Such a solution makes the "no facilities" fix meaningless as the ILECs figure out new ways to deny UNE provisioning. If the policy objective is to protect the ILEC imbedded base of special access revenue (as expressed in the EEL Clarification Order), that alleged problem is resolved by tying use restrictions only to special access to EEL conversion, not going down the slippery slope to include new combinations and stand-alone UNEs. CLECs have gone through the extra work to collocate to obtain UNE loops and their offerings are not the substitute for the traditional special access services purchased by IXCs from ILECs. The additional administrative layer would harm only UNE-reliant CLECs and their customers and would-be customers desiring affordable, innovative alternatives to ILEC offerings. Additionally, the Parties have repeatedly stressed that EELs and UNEs must be made available for the delivery of pure data services. The problem that the FCC had intended to fix was a massive conversion of IXC special access to EELs, thereby causing an immediate dramatic revenue reduction for the ILECs. Perhaps the better solution to deal with the FCC-perceived problem might be to say that EEL restrictions apply only to a carrier offering stand-alone long distance. CLECs and their customers have been the only parties to have suffered over the temporary EEL use restrictions. The largest IXCs have not replaced special access with EELs; nor is there any indication that these long distance carriers intend to purchase UNEs in lieu of the special access that they currently purchase at huge volume and term discounts that the smaller, stand-alone CLECs could never obtain. CLECs have been the parties subject to ILEC audits, not the IXCs, and CLECs have been the parties forced to purchase special access instead of EELs, at prices much higher than the IXCs and at prices that make it completely unviable to compete head-to-head against the ILEC.

With regard to specific eligibility criteria, the Parties noted that ILECs will likely argue that some CLECs do not even interconnect via 251(c)(2) interconnection trunks and therefore are not eligible to obtain UNEs or UNE combinations (*e.g.*, a DLEC that is simply sending traffic to the Internet or establishing a point-to-point data connection). Other CLECs have gone through the extra trouble to build their own offices and have foregone establishing collocations at ILEC offices. Eligibility criteria must not allow ILECs the power to preclude such CLECs from obtaining UNEs or UNE combinations.

It would be ironic, or at least absurd, to impose use restrictions or eligibility criteria on CLECs now that the Bells have received in-region, InterLATA authority throughout most of the nation -- only the CLECs would be subject to the restrictions that were intended to be imposed on Bell Companies by section 271 of the Telecom Act. Frankly, the FCC may be better served applying the mandate of 706 to ensure that CLECs have unfettered access to EELs and UNE loops to provision the full range of data services. Only with access at UNE rates will

the CLECs be able to build competitive data networks. CLECs, furthermore, do not build networks based on the arbitrary geographical configuration of the LATA boundaries. Many CLECs are attempting to operate national data networks, or, at least, networks that traverse LATA boundaries. Such CLECs must not be restricted by arbitrary LATA boundaries, particularly in light of the fact that even the Bell Companies are no longer subject to such limitations.

The Parties also expressed deep concern over the prospect that the FCC may limit CLEC capacity to fiber-fed loop plant. If consumers are to obtain the benefits of broadband, CLECs must be assured nondiscriminatory access to the full features, functionalities and capabilities of loop facilities. As we have said many times before, TELRIC pricing principles can adequately account for any demonstrated increase in costs or faster depreciation associated with arguably risky fiber deployment. CLECs have demonstrated their willingness to help defray the costs of such buildouts and, if CLECs were ensured nondiscriminatory access to fiber-fed loops, then ILECs would recover costs much more quickly by allowing CLECs to market services rapidly and reach a broader potential market than the ILEC could reach as a monopoly provider. The FCC must also consider the serious advantages the ILECs maintain, not just through access to their captive consumer base, but also because of superior access to conduits and other rights of way. Finally, the Parties noted that, if CLECs are somehow relegated to old technology and capacity limitations, it would effectively preclude them from competing against an ILEC which could always offer a more robust offering or bundle of offerings at a fraction of the price the CLECs legacy offering.

If you have any questions about this matter, please contact me at 202-969-2587.

Respectfully submitted,

/s/

Jonathan Askin

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